IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 26

HENRY ANTON PFISTER, Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, et al.

No. 27

HENRY ANTON PFISTER, Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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NOTE: All emphasis in this petition for rehearing is supplied.

To the Honorable Justices of the Supreme Court of the United States:

The petitioner respectfully presents his petition for rehearing:

I.

A Sense of Responsibility,

In presenting this petition for rehearing counsel for the petitioner is impelled by a sense of responsibility growing out of his experience in the cases of *Wright* v. *Vinton*, 1937, 300 U. S. 440, and in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180. The first upheld the constitutionality of Section 75(s), the farmer debtor law. Unfortunately its effect was blacked out by "Note 6" of the opinion which asserted that farmer debtor proceedings might be dismissed for "lack of good faith" or because there was "no hope of rehabilitation." The note cited some sixteen decisions of this and of the lower courts.

The point at issue, constitutionality, having been decided, the potential import of Note 6 was not made the subject of a petition for rehearing. For more than two and a half years thereafter mortgage holders continued to secure dismissals of farmer debtor cases by filing motions based on this Note 6. Thousands of farmer debtors thereby lost titles to their farms, for the total effect was not measured by the farmer debtor cases actually dismissed, but by the success of pressure from mortgage holders upon financially involved farmers who could secure no relief from a farmer debtor petition.

During that period counsel for this petitioner argued in many courts that Note 6 was not the law because (1) the decisions it cited did not sustain it, (2) because the statute did not support it, and (3) because it was not germane to the issue. It was not until certiorari was granted in the *Bartels* case (after certiorari had been denied in several intervening cases) that an opportunity was again

afforded to present to this court the erroneous Note 6. Upon the same arguments presented without success to the lower courts in the intervening two and one-half years, this court then held in Note 3 at page 184 of the *Bartels* opinion that "What is said upon this point in Note 6 in *Wright* v. *Vinton*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the Statute." From that time the mortgage holders relegated their combat tactics to other grounds.

II.

Simplification of Discussion.

In order to simplify the discussion all references to methods of review are styled "appeal," whether the particular case included a writ of error, a petition for certiorari, an appeal, or any other form of review.

Also because there are no terms in a court of bankruptcy there will be no reference to whether an application for rehearing was filed within or after term unless there is some particular reason for doing so. This court has made this very clear when it said:

> "Though a court of bankruptcy sits continuously and has no terms, respondents urge that, as courts of bankruptcy are courts of equity, the rules applicable to the rehearing of a suit in equity shall be applied in bankruptcy cases" . . .
>
> "But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, **limited** by the expiration of the term at which

the judgment or decree was entered and **not by the period allowed for appeal** or by the fact that an appeal has been perfected. **There is no controlling reason** for denying a similar power to a court of bankruptcy or **for limiting its exercise to the period allowed for appeal.**"

Wayne v. *Owens-Illinois*, 300 U. S. 131, at pages 136 and at 137.

III.

The Issue.

The opinion, on the first page of the printed leaflet form, succinctly states the **issue** and "other questions . . . which may be fairly subsumed" in these words:

> **"The issue.**
>
> A conflict of circuits as to whether the ten day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal, impelled us to grant our writ."

This was plainly the issue, and the sole issue, brought to this court, because:

1. The only ground of the final decree of the District Court in each case was that "this court is **without jurisdiction.**" R. 175, R. 177. The reason given was that the petitions for review were filed more than ten days from the dates of the orders to which they respectively related.

2. The appellate court affirmed the District Court, saying: "The District Court followed the Statute and it had **no power to do otherwise.**" R. 214. The statute referred to is Section 39 (c) of the Bankruptcy Act which names ten days for the filing of a petition for review.

This court decided this issue in favor of the petitioner. At page 3 of the opinion it is said, referring to the appellate court's decision that the petitions for review being filed after ten days "were not filed in time" and therefore the District Court had no jurisdiction, "we disagree with the Court of Appeals upon the last ground upon the assumption that the language meant that the District Court was without 'power' to review the orders."

There, we respectfully urge, the opinion should have ended by reversing the judgment. On the contrary this court affirmed it on three "subsumed questions."

The "subsumed questions."

These are stated on pages 1 and 2 to be:

(1) Whether Section 75(s), four months, or Section 39(c), ten days, prescribes the time for filing a petition for review in farmer debtor proceedings.

(2) Whether the period for seeking review is extended when a petition for rehearing is entertained and denied.

(3) Whether a stay order under Section 75(s)(2) for less than the statutory three years is lawful.

As to the court's decisions on questions 1 and 3 (1, that Section 75(s) relates only to appraisals and 3, that the petitioner having asked for two years, eight months and thirteen days, he can not object) the petitioner raises no present objection. This court has spoken upon a subject in which there was no precedent.

However, upon question 2 (that a petition for rehearing entertained and denied does not toll or suspend the finality

of an order for appeal) your petitioner presents the uniform history of **the decisions of this court over a period of nearly one hundred years which have firmly established the rule that a petition for rehearing which is entertained, that is considered, and denied, dates the time for seeking appeal from the denial and not from the original entry of the order.** All phases of the rule have been so thoroughly, repeatedly, and consistently explored by this court and sustained against all objections, over a period of nearly a hundred years, that if this opinion is now the law, then a principle of law that has been universally followed ever since there has been an American Jurisprudence is now reversed. Henceforth we follow an entirely new course fraught with serious consequences if the opinion stands and so long as it stands. The reason is that a litigant can not know, until the **end** of a series of pleadings and hearings whether the rule is to operate.

IV.

An examination of the opinions of this court on the established rule that:

> **A petition for rehearing of an order which is entertained and denied suspends the finality of the order for the purpose of appeal and the time for appeal runs from the denial.**

1. *Brockett* v. *Brockett*, 1848, 43 U. S. (2 How.) 238.

Time for appeal ten days. Petition to reopen filed **after time** for appeal. The court refused to reopen the decree and an appeal was taken.

A motion was made in this court to dismiss the appeal upon the ground that it was filed out of time.

Page 240: "And the court then refused to open the final decree." That is, the court of the first instance merely **entertained** the application for rehearing and denied it which this court held sufficient to suspend the time for filing an appeal. This court further said: "The court took **cognizance** of the petition and referred it to a master commissioner . . . and the court then **refused to open the final decree** . . . the final decree of the 10th of May was suspended by the subsequent action of the court and it did not take effect until the 9th of June." The original decree was not set aside. There was merely a denial of the motion to reopen it.

2. *Wylie* v. *Coxe*, 1853, 55 U. S. (14 How.) 1.

In referring to the Brockett decision this Court clearly indicated that the *Brockett* decision required only that a court shall **entertain** an application for rehearing in order to suspend the time for appeal. This court said, page 2:

> "In that case before any appeal was taken a petition was filed to open the decree . . . the court refused to open the decree and the party thereupon appealed . . . from the original decree and gave bond . . . This bond was given within ten days after the refusal of the motion but was more than a month after the original decree. And the court held that this appeal was well-taken . . . because the court regarded the original decree as suspended by the action of the court on the motion and that it was not effectual and final until the motion was overruled."

3. *Washington* v. *Bradley*, 1869, 74 U. S. (7 Wall.) 575.

The final decree was originally entered on February 6. The time for appeal was ten days. A motion to rescind the decree was filed out of time in twenty-six days. It was

denied on March 13 and the appeal was taken. This court said in referring to the various proceedings:

> "We do not think it necessary to consider the effect of either of these proceedings; for on the 6th of March, as we understand, during the term in which the decree was rendered, **a motion to rescind was made on behalf of the plaintiffs and was heard and decided.**"

Referring to the date when the decree became final this court said "It became final in this case when **the motion to rescind had been heard and denied.**" The original decree was not set aside. The motion to set it aside was merely denied.

4. *Slaughter House Cases*, 1870, 77 U. S. (10 Wall.) 273.

The time for appeal was ten days. Petitions for rehearing were filed thereafter. Four weeks after the entry of the judgment rehearing was refused. This court said:

> "Filed as the writs of error were, within ten days from the date of the entry **refusing the petition for rehearing**, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject but since the decision of the case in *Brockett* v. *Brockett* the question must be settled in accordance with the views of the plaintiffs."

The original judgment was not set aside or opened up. The petitions for rehearing were merely refused.

5. *Sage* v. *Central Railroad*, 1876, 93 U. S. (3 Otto) 412.

In interpreting its earlier decision in the *Brockett* case this court again said:

> "The motion was one that could be made without leave and was **entertained**. . . . Under such circum-

stances the court held that the decree did not become final until the motion for rehearing was decided."

The motion in the *Brockett* case, it will be recalled, was merely denied, there was no setting aside of the decree.

6. *Memphis* v. *Brown*, 1877, 94 U. S. (4 Otto) 715.

After the time for a writ of error had expired, a motion was made to set aside the final order but the motion was denied. Again referring to its earlier *Brockett* decision this court said "Under the ruling in *Brockett* v. *Brockett* the motion . . . suspended the operation of that judgment so that it did not take final effect for the purpose of a writ of error until May 20 when the motion was disposed of", that is, by denying it. Here again the final order was not set aside. The motion to do so was merely denied.

7. *Cambuston* v. *U. S.*, 1877, 95 U. S. 502.

In discussing the rule, this court said: "In *Brockett* v. *Brockett* it was held that a petition for rehearing filed . . . and actually **entertained** by the court, suspended the operation of a decree in equity until the petition was disposed of". "Setting aside" was recognized as not a requirement.

8. *Goddard* v. *Ordway* (*Phillips* v. *Ordway*), 1880, 101 U. S. (11 Otto) 110.

An appeal had already been allowed before the motion to vacate the order was filed. In discussing what a court must do to "**entertain**" an application this court said:

"it is sufficient to say that the motion to vacate the order of affirmance and grant a rehearing **was made to and recognized by the court.** . . . This is evident from the fact that the motion was **entered on the minutes of the doings of the court** for the term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment but when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court in some form gave it **judicial attention** and that it was presented in some regular way."

At another part of the opinion the court said: "The motion when **entertained** prolongs the suit and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding:". Setting aside of the order is distinctly not required.

9. *Texas* v. *Murphy*, 1884, 111 U. S. 488.

The record did not show whether the application for rehearing was made before or after the expiration of the time for appeal. All that the record contained concerning the nature of the motion, its filing and its consideration and disposition by the court were the following words: "Motion of the appellant for a rehearing in this cause came on to be heard and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused;" The court said: "The record does not show in express terms when the motion for a rehearing was made but it was **entertained** by the court and decided on its merits". The nature of the consideration given to the motion for rehearing is indicated by the foregoing quotation from the record. This court further said: "In *Brockett* v. *Brockett* it was decided that a petition for rehearing presented in due season and **entertained** by the

court prevented the original judgment from taking effect as a final judgment for the purpose of an appeal or writ of error until the petition was disposed of". Again the court said: "It was expressly ruled in *Brockett* v. *Brockett* which has been followed in many cases since that if a petition for rehearing is presented in season and entertained by the court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of". The court then cites the *Slaughter House* cases, 77 U. S. (10 Wal.) 278, and *Memphis* v. *Brown*, 94 U. S. 717. There is no requirement that the subject order must first be "opened up" "vacated" or "set aside".

10. *Aspen* v. *Billings*, 1893, 150 U. S. 31.

After a final decree was entered an application for rehearing was filed. The record recites that the "motion for a rehearing of this cause having heretofore come on to be heard and having been submitted upon briefs" it was denied. This court held that the period for seeking appeal did not begin to run until the denial of the application for rehearing.

This court again stated the rule as follows: "The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then, the judgment or decree does not take final effect for the purpose of the writ of error or appeal". The court cited again *Brockett* v. *Brockett*, *Texas* v. *Murphy*, and *Memphis* v. *Brown*.

The court further said: "But it is said this can not be the result under either statute or rule of the mere filing of a motion or petition for rehearing and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. . .

But we should be inclined to hold, if a decision in that regard was called for, that **since the application was passed upon** as having been duly made, the presumption must be indulged in that it was **entertained** by the court in the first instance" . . . Very clearly it is not required that the original decree must be set aside.

11. *Voorhees* v. *Noye*, 1894, 151 U. S. 135, 137.

On January 7 a decree was originally entered and a motion for rehearing was filed. Ten months later the following entry went on: "This cause coming on to be heard this day on the motion for rehearing filed herein, was argued and submitted to the court by solicitors for the respective parties; whereupon the court takes the same under consideration". An entry two months later showed that the motion for rehearing "on its merits was reargued and submitted to the court" and taken under advisement. The next entry denied the motion for rehearing, the court holding "that it is now too late to sustain said motion or to interfere with the decree". Upon such a record this court held that the original decree of January 7, a year previously "did not take final effect as of that date for the purposes of an appeal nor until February 17, 1892, because the application for rehearing was **entertained** by the court . . . and not disposed of until then". *Aspen* v. *Billings* was cited. Again it is clear that there was no setting aside of the order.

12. *Northern Pacific* v. *Holmes*, 1894, 155 U. S. 137.

An order was entered and the court granted leave to file a petition for rehearing. The petition for rehearing and an answer were filed. Two and a half years later an entry was put on in which the lower court recited: "said petition and answer having been taken under advisement by this court . . . the court being fully advised in the premises, denied said petition for rehearing".

This court said: "It is well settled that if a motion for petition for rehearing is made or presented in season and **entertained** by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal". *Aspen* v. *Billings*, and *Voorhees* v. *Noye* were cited. Here the finality of the decree for appeal was suspended two and a half years. The original decree was not set aside.

13. *Northern Pacific* v. *O'Brien*, 1894, 155 U. S. 141.

This court merely followed its decision in *Northern Pacific* v. *Holmes*, 155 U. S. 137, saying: "This case falls within that just decided and for the reason there given, the writ of error must be dismissed". That is, in both cases without setting aside the original order its finality was suspended against the running of time for appeal until a petition for rehearing was denied.

14. *Kingman* v. *Western*, 1898, 170 U. S. 675.

A judgment was entered and a motion to set it aside and for a new trial was filed. Thereafter the following entry was made: "This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties whereupon after careful consideration thereof and being fully advised in the premises it is now on this day considered, ordered, and adjudged by the court that said motion be and the same is hereby overruled and that the judgment heretofore entered herein be and remain absolute".

An appeal was taken and a motion was made to dismiss it because it was out of time, reckoning from the date of the original entry of the judgment.

Discussing the subject of the effect of the application for rehearing, and especially referring to the point that no leave was obtained to file such an application for rehearing this court said: "No leave to file it was required as it was **entertained** by the court, argued by counsel without objection and passed upon. It must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or petition for rehearing is made or presented in season and **entertained** by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal". *Aspen* v. *Billings*, *Voorhees* v. *Noye*, *Brockett* v. *Brockett*, *Texas* v. *Murphy*, *Memphis* v. *Brown*, and *Northern Pacific* v. *Holmes* were cited.

Referring to the rule that with the ending of the term orders which have been entered within the term passed beyond the control of the court, this court said: "But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception."

In distinguishing between the rule that the denial itself of an application for rehearing is not subject to appeal, and the rule that such denial dates the finality of the order for appeal, the court said: "It is true that a writ of error does not lie from this court or the courts of appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final for the purpose of taking out the writ The effect of a judgment, entered at once upon the return of a verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for a new trial. We do not think it is, and are of opinion that the limitation [for appeal] did not commence to run in this case until the motion for a new trial was overruled".

The original judgment was not set aside. A motion to do so was merely denied.

15. *Conboy* v. *First National* (1906), 203 U. S. 141, 146. The District Court affirmed an allowance of claim in bankruptcy. The Circuit Court of Appeals affirmed January 23, 1905. Time to appeal to Supreme Court thirty days. Petition to recall mandate filed April 25, 1905, was denied. Petition for rehearing of the original affirmance was filed May 8, 1905, and denied May 24, 1905. Appeal allowed by a Justice of the Supreme Court May 27, 1905. The appeal was dismissed.

The opinion contains this statement at page 145:

> "The cases cited for appellant, in which it was held that an application for a rehearing made **before the time for appeal** had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired."

The cases cited do not support that statement. There were eight of them:

Brockett v. *Brockett*, discussed at page 6 of this petition for rehearing;

Aspen v. *Billings*, discussed at page 11 of this petition for rehearing;

Voorhees v. *Noye*, *discussed* at page 12 of this petition for rehearing;

Slaughter House Cases, discussed at page 8 of this petition for rehearing;

Washington v. *Bradley*, discussed at page 7 of this petition for rehearing;

Memphis v. *Brown*, discussed at page 9 of this petition for rehearing;

Texas v. *Murphy*, *discussed* at page 10 of this petition for rehearing, and

Kingman v. *Western*, discussed at page 14 of this petition for rehearing.

The total result of an examination of the citations referred to in the *Conboy* opinion just quoted is that in four of the cases (*Brocket* v. *Brockett*, *Washington* v. *Bradley*, *Slaughter House* cases, and *Memphis* v. *Brown*) the application for rehearing came **after time for appeal.** In one case (*Texas* v. *Murphy*) it is not shown when the application was filed, but time for appeal was sixty days and the application was disposed of in 126 days and the decisions cited and followed and the reasoning in the opinion were based on applications made after time for appeal. See the digest of *Texas* v. *Murphy*, at page 10 of this petition for rehearing. In the three other cases cited to the court in the *Conboy* case (*Aspen* v. *Billings*, *Voorhees* v. *Noye*, and *Kingman* v. *Western*) the application came within time for appeal.

It is very clear that the *Conboy* case was not properly presented for the cases rejected by the court were five to three against the decision. This court in *Wayne* v. *Owens-Illinois*, discussed at page 27 of this petition for rehearing, was justified in saying in Note 2 that the *Conboy* case "adverted to the question without deciding it."

The Appellate Court in this *Pfister* case at R. 213 made this statement:

> "Appellant's petition for rehearing was filed merely for the purpose of reviewing and extending the time for filing a petition for review, under which state of facts the court in the *Wayne* case said an appeal should be dismissed. The leading case on this subject seems to be *Conboy* v. *First National Bank*, 203 U. S. 141, where the question is fully discussed."

Counsel for the petitioner has made a minute study of the *Conboy* case, including copies of papers in the files, eliciting the foregoing and the following facts about it.

Contrary to the statement from the opinion of the Appellate Court just quoted, the *Conboy* opinion does not discuss the subject of a petition for rehearing filed merely to create time for appeal. If flatly decides that a petition for rehearing filed after time for appeal has expired does not extend the time for taking appeal. The nearest it comes to the subject of a petition for rehearing filed "merely" to extend time for appeal is in these words:

Page 145:

> "Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

Here are the Facts:

January 23, 1905—Order of Circuit Court of Appeals affirming District Court.

February 20, 1905—This court decided *Western* v. *Brown*, 196 U. S. 502.

February 22, 1905—Thirty days for appeal expired.

April 25, 1905—Petition to recall mandate filed. This petition averred that the mandate had issued without notice, that on hearing of it the appellant, a trustee in bankruptcy, called a meeting of the creditors on March 3, 1905, to be held March 30, 1905. That while the creditors' meeting was pending he heard of the decision of this court in *Western v. Brown*, 196 U. S. 502, which established a different rule of applicable law.

May 8, 1905—Petition for rehearing filed, setting up the applicable rule announced in *Western* v. *Brown*, 196 U. S. 502, decided February 20, 1905, and published March 15, 1905.

Now as the decision in *Western* v. *Brown*, 196 U. S. 502, was not announced until February 20, 1905, and published March 15, 1905, it could not be said that the appellant could have made his application for hearing "and had it determined within thirty days and still have had time to take his appeal." The fact is that the *Conboy* decision is a lonely minority among the numerous decisions made long before and since holding the opposite.

16. *U. S.* v. *Ellicott*, 1912, 233 U. S. 524, 539.

A judgment was entered and a motion for a new trial was filed, argued and later overruled more than a year thereafter. A motion to dismiss the appeal was denied. This court said: "The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgment or decrees, is, we think, applicable to judgments or decrees of the court of claims and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court has been disposed of; and the time for appeals begins to run from the date of such disposition". *Kingman* v. *Western* and *Texas* v. *Murphy* were cited. The original judgment was not opened up or set aside.

17. *Andrews* v. *Virginian*, 1919, 248 U. S. 272.

Here again the question was when a judgment became final on appeal. Following judgment in a state court and after term, a petition for a writ of error was presented to the highest state court and later denied. The case was then brought into this court by writ of error. Because of a federal statute the jurisdiction of this court depended upon when the state judgment became final for appeal.

The opinion is important because it discusses the reason for the rule that the application for rehearing of an order when entertained suspends the finality for appeal until it has been disposed of. The opinion explains why it is the **existence** of the power to vacate the original order and not its **exercise** that operates the rule. It clearly shows that this court has already considered and rejected the **unworkable theory** that it is **the character of the final action of the court** upon that application and not the **entertaining** of it at the outset which determines whether the time for appeal is to date from the original entry or from the date of the entry showing the action of the court thereon.

The situation in this *Andrews* case was that after a judgment was entered by a lower court, the characteristic of its finality or its suspension depended upon an unknown factor, namely whether or not the reviewing court should notice it and thereafter assume jurisdiction to review. According to the argument of the respondents in that case, which is exactly parallel to the argument which would support the opinion in this *Pfister* case on the point under discussion, if the upper state court did not take jurisdiction, then the orginal order was final at the date of its

original entry. But, said they, if the upper state court did assume jurisdiction, then the rule would apply.

The precise question in this *Andrews* case which was before this court was whether this court had jurisdiction, under the federal statute, of the judgment of the lower of the two state courts. This in turn depended upon the effective date for appeal. Now the jurisdiction of this court to take the case by writ of error was abolished by Act of Congress operative on November 6. The judgment in the lower state court was entered on June 16 and if it was then the final judgment, this court had jurisdiction. If it did not become final until some time after November 6, when the upper state court declined to act, then this court had no jurisdiction. This court held that the state judgment was not final for appeal until the upper state court rejected the petition for writ of error. It is important to note that the upper state court did not grant the petition for writ of error and then upon review sustain the lower judgment. It merely denied the petition for a writ of error. This procedure is parallel to the denial by the conciliator in the *Pfister* case of his application for rehearing.

Because the upper state court denied the Andrews petition for writ of error it was argued by the respondents in this court that the finality of the original judgment in the lower state court was never disturbed. This court held that if such argument prevailed it could not be ascertained until the action of the upper state court whether the decree was or was not final for appeal when it was originally entered. Exactly on that point this court said: "but the **existence** of the power and not the considerations moving to its **exercise** is the criterion by which to determine whether the judgment of the trial court was

final at the time of its apparent date or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality".

This court characterized the argument presented to it as follows:

> "The contention therefore that the judgment of the trial court was a final judgment susceptible of being here reviewed by writ of error must rest upon the **impossible assumption that the finality of this judgment existed before the happening of the cause by which alone finality could be attributed to it.**"

And later in the opinion this court said: "Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government and material therefore to the exercise by this court of its rightful authority".

That this court recognized that the principle here discussed is equally applicable to rehearings is demonstrated by the opinion citing it in the later case of *Chicago* v. *Basham*, 1919, 249 U. S. 164; *Citizens* v. *Opperman*, 1919, 249 U. S. 248; and *Morse* v. *U. S.*, 1916, 270 U. S. 151. These citations are discussed below in their proper order.

18. *Citizens* v. *Opperman*, 1919, 249 U. S. 448.

It was held that not the original date of the judgment but the date when a petition to rehear it was overruled started the running of the time for appeal.

At page 449 this court said: "A petition to rehear was overruled May 18, 1917, and at that time the judgment be-

low became final for the purposes of review here". *Andrews* v. *Virginian* and *Chicago* v. *Basham* were cited.

Page 450: "Where a petition for rehearing is **entertained**, the judgment does not become final for purposes of review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from the date of such denial or other disposition".

Again it is seen that it was not required that the judgment be set aside.

19. *Chicago* v. *Basham*, 1919, 249 U. S. 164.

A judgment was entered on November 26. On April 17 of the next year a petition for rehearing was overruled and on December 18 a second petition for rehearing was overruled. This court held that the judgment became final for the purpose of appeal to this court when the second petition for rehearing was overruled. Page 167: "It is only a judgment marking the conclusion of the course of the litigation in the courts of the state that is subjected to our review. Hence, whatever its forms of finality, if a judgment is in fact **subject to reconsideration** and review by the state court of last resort, through a medium of a petition for rehearing and such a petition is presented to and **entertained** and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of and until then the judgment previously rendered can not be regarded as a final judgment within the meaning of the act of Congress". *Andrews* v. *Virginian* was cited. The original judgment was not set aside in either application for rehearing. The rehearing was merely denied.

20. *Morse* v. *United States*, 1926, 270 U. S. 151.

This case came from the court of claims where an express rule required that after one motion for a rehearing was denied, another might not be filed except by leave. After such a motion was denied, two motion for such leave were successively made and denied whereupon an appeal was taken, within the time prescribed if measured from the denial of the motions for leave, but long past such period if it began to run from the original denial of the original motion.

This court took some pains to distinguish between a motion for **leave** to file a motion for rehearing and a **motion** for rehearing and restated the well-settled rule that a motion for rehearing which is **entertained** by the court destroys the finality of the order so that time for appeal dates from the disposition of the application for rehearing. Page 153: "There is no doubt under the decisions and practice in this court that where a motion for new trial in a court of law or a petition for rehearing in a court of equity is duly and seasonably filed it suspends the running of time for taking a writ of error and appeal and that the time within which the procedure for review must be initiated begins from the date of the denial of either the motion or petition." *Brockett* v. *Brockett*, *Washington* v. *Bradley*, *Memphis* v. *Brown*, *Texas* v. *Murphy*, *Aspen* v. *Billings*, *Kingman* v. *Western*, *U. S.* v. *Ellicott*, *Andrews* v. *Virginian*, and *Chicago* v. *Basham* were cited.

Page 154: "Applications for leave did not suspend the running of the ninety days after the *denial of the motion for a new trial* within which the application for appeal must have been made." Here this court again recognized

the application of the rule. That is, the 90 days for appeal ran from the denial of the motion for rehearing, not from the original entry of the judgment. The judgment was not set aside. A motion to rehear it was merely denied.

In this *Pfister* case the petitioner did not file an application for leave to file the petition for rehearing. He filed his petition for rehearing which was denied.

21. *Gypsy* v. *Escoe*, 1939, 75 U. S. 498.

This case is quoted in Note 7 of this *Pfister* decision as authority for the statement that "Where a petition for rehearing is filed before the time for petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins from the date of the denial of the petition for rehearing".

This *Gypsy* case is in direct conflict with the implication of Note 7 just referred to, for the reason that the court dismissed certiorari in this *Gypsy* case because as it said: "On September 30, 1927, **more than three months** after denial of the petition for rehearing (June 14) the present petition for certiorari was filed". This court went on however to suggest to the petitioner how it might file a timely petition for certiorari by going back into the state court and filing another petition for rehearing. Of course the suggested petition for rehearing would be filed **far beyond the period for filing petition for certiorari** because the instant petition for certiorari was expressly denied because three months had elapsed. Therefore, any other rehearing application would be much more over time.

22. *U. S. v. Seminole*, 1937, 299 U. S. 417.

A motion for rehearing was filed, and it was denied on the very last day of the three months for appeal. This started the three months running again. Two and a half months later a second motion for rehearing was filed, by leave, and it was denied six months and one week after the original entry of the judgment. A month still later an appeal was taken.

The petition for certiorari was filed in this court within time if it dated from the overruling of the second motion for rehearing. It was out of time if dated from the denial of the first motion. Of course, it was much farther beyond the original entry of the judgment. After considering this situation and applying the rule this court held at page 421: "This court has jurisdiction".

In this *Seminole* case we have a situation in which the finality of the original judgment was twice suspended for appeal. First it was suspended by the motion for rehearing which was not decided until the end of the period for appeal. A short time before the expiration of the second extended period for appeal, measured from the overruling of the first application for rehearing, the second motion for rehearing was filed. It was overruled and the appeal was taken within that second period.

In neither of the applications for review in this Seminole case did the court first grant an application for rehearing and then adhere to its original judgment. Nor did it set aside its original judgment. In each instance, it merely denied the application for rehearing exactly as was done in the *Pfister* case.

This court said, page 421: "It is well settled that the time within which applcaton may be made for revew in this court does not commence to run until after disposition of motion for new trial seasonably made and determined". *Brockett* v. *Brockett, Texas* v. *Murphy, U. S.* v. *Ellicott, Citizens* v. *Opperman, Morse* v. *U. S., Gypsy* v. *Escoe* were cited.

23. *Wayne* v. *Owens-Illinois*, 1937, 300 U. S. 131.

The scope and phrasing of the opinion in *Wayne* v. *Owens-Illinois*, 300 U. S. 131, was formed by the facts in that case but they did not limit or distort the general rule. It applied the rule to an unusual state of procedure. The discussion and the notes show that the court was sustaining the general rule and adapting it to the facts of the case.

The appellate court in the *Wayne* case had dismissed the appeal there because the rehearing had been applied for in the District Court after the time for appeal had expired.

The opinion states that the question was whether the general rule operates when a rehearing is set in motion. **"After the expiration of the period . . . for appeal"**. And the opinion continued: "To resolve a conflict of decision we granted certiorari", pages 132, 133. Note 2 on page 133 lists the decisions conflicting with the decision on which certiorari was granted. They are:

West v. *McLaughlin*, 1908, CCA 6, 162 Fed. 124. The period for appeal was ten days. Forty-nine days after the District Court entered an order, a petition for rehearing was filed. After consideration of the petition for rehear-

ing the District Court adhered to its original order. The Appellate Court sustained the appeal.

Cameron v. *National*, 1921, CCA 8 (not CCA 2) 272 Fed. 874. The period for appeal was ten days. Fourteen days after the District Court entered its order a motion to vacate was filed and granted. Upon rehearing the order was reentered. An appeal was taken. The appellate court held it had jurisdiction of the appeal. It cited in support of its decision its former decision in *Todd* v. *Alden*, CCA 8, 245 Fed. 462, where it had held that when a rehearing was denied the time for appeal ran from the denial.

Conboy v. *First*, 1906, 203 U. S. 141, Note 2 said, "adverted to the question without deciding it". In that case a petition for rehearing filed in the Circuit Court of Appeals after the thirty days for appeal was denied and this court denied an appeal. (This *Conboy* opinion is discussed in this petition for rehearing at page 16.

In the *Wayne* case the issue was, could the bankruptcy court still exercise its power over its judgment **if the application for such exercise was filed after time for appeal.** This court held that it could, saying "There is no controlling reason . . . for limiting its exercise to the period allowed for appeal". Page 137. The issue was not, should a court proceed by first setting aside its order and upon reconsideration adhere to it and reenter it, or did the court in the instant case accomplish the same end by merely denying an application for rehearing. It was **not that procedural element.** The issue was the **time element.**

V.

Comment Upon the Application of the Foregoing Twenty-three Decisions of this Court to the Pfister Case.

There is not an element **present** in the Pfister procedure relating to the petitions for rehearing, nor an element **lacking**, that would withhold the application to them of the general rule so firmly established in the long history of judicial opinions by this court through almost a century. That rule, restating it, is: A petition for rehearing which is entertained by a court and denied suspends the time for appeal so that it runs, not from the entry of the order to which it is directed, but from the denial of the application for rehearing.

VI.

The basis of the rule is the EXISTENCE of the Power of a Court and Not Its EXERCISE.

The general rule, that a petition for rehearing which is entertained by the court and denied tolls the time for appeal, rests upon the **existence** of the power of a court to set aside its judgment, not upon the **exercise** of that power. When a court has **entertained** an application for rehearing it has indicated that it has invoked the **power**. The genesis of the subject is the ancient doctrine that a judgment remains "during the term in the breast of the court." Blackstone's Commentaries, Book III, page 407. During term the judge is perfectly free to look again into his action. If he "**entertains**" a suggestion that he do so, the judgment is not final until he indicates whether he will or will not revise his action. If he refuses to en-

tertain or consider the motion, the finality of the judgment is not disturbed. It is within the judge's discretion whether he will change the judgment and his action is not subject to appeal. But while he is considering what to do, that is entertaining the motion, the finality of the judgment is suspended.

"The court below while such a motion is pending, has not lost its jurisdiction over the case, and having **power** to grant the motion, the judgment is not final" . . . "it was **entertained** by the court, argued by counsel without objection and passed upon." *Kingman* v. *Western*, 1893, 175 U. S. 675.

In the case from which these quotations from the opinion are taken, **the lower court did not grant a rehearing, it denied it.** That is, it did not grant a rehearing and after rehearing adhere to its original order; nor did it grant a rehearing, vacate the original order and then reinstate it. It merely denied a rehearing after considering it.

This distinction between the **existence** of the power to grant a rehearing and the **exercise** of that power is not a mere scholastic subtlety. Its disregard would be fraught with dire consequences precisely because, as suggested in this Pfister opinion, it could not be known whether the original entry of the final order, or the action upon the application for rehearing, would date the running of the time for appeal. That would be because only the **form** of the order upon the application for rehearing "would show either a **refusal to allow the petition for rehearing** or **a refusal to modify the original order.**" Quoted from the Pfister printed opinion, bottom of page 5.

This court has already carefully considered this primary distinction. It rejected the argument that the **nature of the order** of the court upon an application for rehearing **should determine when time for appeal starts to run.** It held that if such argument prevailed it could not be ascertained, until it was too late, whether the original decree was or was not final. After stating that the decision to review was discretionary and not obligatory, this court said in *Andrews* v. *Virginian*, 1919, 248 U. S. 272, at page 275:

> "But the **existence** of the power and not the considerations moving to its **exercise** is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality."

This court characterized the argument presented to it as follows:

> "The contention therefore that the judgment of the trial court was a final judgment, susceptible of being here reviewed by writ of error, must rest upon the impossible assumption that **the finality** of that judgment **existed before the happening of the cause by which alone finality could be attributed to it.**"
>
> "Nor," continued that opinion, "is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material therefore, to the exercise by this court of its rightful authority."

The demarkation between: on the one hand, **considering whether a motion for rehearing should be granted,** and on the other, **considering the original matters which lead to**

the original judgment, is usually so indefinite that no practical distinction can be made. **Actually the same general subject is involved and whatever discussion or consideration is pertinent to the one is also pertinent to the other.** The conciliation commissioner states that he considered the whole matter and he did so. Both parties filed pleadings and argued. Motions to dismiss the application for rehearing were made and denied. He considered each motion for rehearing fully and denied it. R. 13, entry of November 28, 1940; R. 109 to 116; R. 158 to 164. R. 88 to 97. R. 97 to 105. R. 139 to 147. R. 148 to 149. The finality of each order was thereby suspended.

VII.

"Courts Must look for light beyond the law books to the experience of the world."

Issues arising within the perview of the farmer debtor law can not be considered apart from the heat and passion of the conflict aroused by it. Unless "the courts . . . look for light beyond the law books to the experience of the world in which we live", the purpose of Section 75 as intended by the legislative arm of the government will inevitably be defeated.

When this court finally determined the constitutionality of Section 77 for railroad debtors, of Section 77B for corporation debtors, and of Section 81 for municipal debtors, these laws were from then on recognized as the laws of the land and they have been faithfully executed. Not so with the farmer debtor law which is far less stringent than the other three. It has been the subject of persistent and vehement opposition in every grade of federal and state

courts. This court itself has twice changed its previous decisions on Section 75. *Wright* v. *Union Central*, 1940, 311 U. S. 73, overruled *Louisville* v. *Radford*, 295 U. S. 555. Note 3 in *John Hancock* v. *Bartels*, 308 U. S. 180, 184, repudiated Note 6 in *Wright* v. *Vinton*, 300 U. S, 440, 462.

All of this stress and strain arises out of the unceasing opposition to the law and all its implications by certain elements of the nation. This opposition is founded upon the mudsill theory of society according to which there must be one stratum to be exploited by the "higher" social strata. American farmers will not occupy that role. The opposition does not remember that the beginning of the agricultural depression in 1920 finally, by 1929, pulled down the entire economic structure of the nation. It refuses to recognize that all life is based upon, grows out of, agriculture, the only industry which creates wealth out of air and sunlight.

Besides all the undisclosed sources of opposition, which are none the less effective, the following have been uncovered.

1. Referees in bankruptcy, including many conciliation commissioners who often simultaneously occupy both positions as in this case, have actively opposed the farmer debtor law. It prescribes a total of only $60 for conciliation commissioner fees, ($25 under Section 75 (a) to (r) and $35 under Section 75 (s)), whereas in the regular bankruptcy the referee is compensated by percentage fees on funds of the estate for every separate act he performs.

See the statement of Herbert M. Bierce, Secretary of the National Association of Referees in Bankruptcy, before the special subcommittee on bankruptcy of the Committee

of the Judiciary (House of Representatives) 75th Congress, December 17, 1937, to January 7, 1938. Report, pages 43 to 50.

Also the statement of Fred H. Kruse, referee in bankruptcy and conciliation commissioner. Same document, pages 35 to 43.

2. Commercial lawyers are also opposed to the farmer debtor law. It provides no fees for receivers or their attorneys for the statute requires any receiver to be discharged. No trustee is provided except in the extraordinary instance where at the end of the proceeding a trustee may, for comtumacious conduct of the farmer debtor, be appointed to wind it up. Section 75 (s) (3). *Wright* v. *Union Central*, 1940, 311 U. S. 273, 280. Such trustee's fee would be nominal and an attorney for the trustee ordinarily unnecessary.

See the statement of Jacob I. Weinstein, commercial lawyer. Same Hearing Report, pages 14 to 35. Especially at page 24, first paragraph under heading 9 and the last half of page 32. Also see the first paragraph on page 64.

3. Particularly conspicuous has been the strenuous opposition of the Federal Land Banks which were set up to solve the farmer debt problems more than twenty years before Section 75 was enacted. By the Land Bank System the Federal Lank Banks are guaranteed a flat one per cent of the interest charged on every farm loan. That is, if the land bank bonds sell for three per cent the farmer pays four. Their source of loan funds has been provided by government credit. The twelve Federal Farm Loan Banks are huge financial institutions whose permanent le-

gal staffs continuously engage in a race with individual farmer debtors who are poorly equipped for such antagonists.

See the statement of General Counsel Evans, Farm Credit Administration. Same Hearing Report, pages 75 to 132.

4. Life insurance companies have also strenuously opposed the farmer debtor law in all its works. A statement that one insurance company accumulated a profit of $50,000,000 prior to 1937 from the resale of mortgaged farms which had been seized during the depression has never been denied. See the same Hearing Report page 56.

The source of the opposition is sometimes, at the moment, undisclosed. The Association of Life Insurance Presidents aided the opponents of the farmer debtor law in this court in *Louisville* v. *Radford*, 1935, 295 U. S. 555, by providing eminent counsel at a cost of $63,790.63. Neither that association nor any of its represented companies had any direct or partisan interest in the case. The souce of the opposition was not uncovered until after four years. See the Hearings before The Temporary National Economic Committee, 76th Congress, pages 4352 to 4355, 4746 and 4750. The amount spent was about fifteen times the value of the farmers estate.

5. Most unfortunately some federal courts have refused to permit farmers to come under Section 75. See the statement of Senator Frazier before the same Special Subcommittee on Bankruptcy, cited above in paragraphs 1 to 3, at page 3. Most members of the federal judiciary are more directly experienced with the economic and legal problems of corporations than of agriculture. Those who have not recently been actively engaged in farming can

have no conception of the complete revolution in farming practices and farm problems within the past quarter century.

Members of the legislative branch being familiar with the complaints of their constituents made special provisions for insuring the speedy and impartial administration of farmer debtor proceedings. They provided that a conciliation commission shall be appointed for each county. Section 75 (a). General Order 50 (2). That none but a $10 fee shall be paid by the farmer debtor. Section 75 (b), (s)(4). That he may file his petition or amended petition with the conciliation commissioner or with the clerk of the court. Section 75 (c), (n). That the filing of his petition takes away the jurisdiction of all other courts. Section 75 (n), (o), (p). That rehabilitation is based upon present security value regardless of the excess of the secured debts. Section 75 (k). Section 75 (s), first (unnumbered) paragraph. Section 75 (s)(3). That the conciliation commissioner shall assist the farmer debtor throughout the proceeding and no attorney shall be required. Section 75 (q). That he may invoke the moratorium even if his proposal should be accepted and confirmed. Section 75 (s), first sentence. That he shall retain possession. Section 75 (s)(2). That rent shall be the usual customary rate of the community based upon rental value, net income and earning capacity. Section 75 (s)(2). That property reasonably necessary for farming shall not be sold. Section 75 (s)(2). That any sale of his property or extra payments shall be consistent with his ability to pay and his rehabilitation. Section 75 (s)(2). That there shall be no sale until he has had opportunity to redeem at the security value. Section 75 (s)(3). *Wright* v. *Union Central*, 1940, 311 U. S. 273. That his proceeding shall not

be dismissed except for his own contumacious conduct. Section 75 (s)(3). *John Hancock* v. *Bartels*, 1939, 308 U. S. 180. *Wright* v. *Union Central*, 1941, 311 U. S. 273. That payments on principal shall be deducted from the redemption value. Section 75 (s)(3). That if his estate be sold he shall have ninety days to redeem it. Section 75 (s)(3). That there shall be no receivership, nor, except under exceptional circumstances, any trusteeship. Section 75 (s)(3). Section 75 (s)(4). That fractional interests may be brought under the law severally or jointly. Section 75 (s)(4). *Mangus* v. *Miller*, decided December 7, 1942, ... U. S. ..... That any farmer debtor case dismissed because of this court's holding in *Louisville* v. *Radford*, 1935, 295 U. S. 555, should be reinstated. Section 75 (s)(5). That upon request a farmer's regular bankruptcy case shall be transferred to Section 75. Section 75 (s)(5). That discharge in regular bankruptcy shall not bar a farmer debtor proceeding. Section 75 (s)(5).

When farmer debtors read Section 75 (and most of them do) they rely implicitly upon its provisions because they have faith in the power of their government. They especially rely upon the impartial protection and assistance of the conciliation commissioner implied in Section 75(q). To them it is inconceivable that they should be entrapped by the subtleties of law courts. Their laws proscribes procedures of regular bankruptcy proceedings in which the creditors control the estate, and it is administered in the creditors' interests. Especially onerous are actions in the administration of farmer debtor proceedings of which the following are only samples of what is consfantly going on in hostile atmospheres: The entry of an order upon a motion introduced and granted the same day without notice (as here, R. 9, extra principal payments of $6375); reference of a proceeding to a conciliation commissioner of another coun-

ty; a motion presented to a conciliation commissioner and heard later by the judge without prior notice of either filing or hearing; retroactive orders; dating orders without entering them or entering them long after their purported entry; issuing orders without notice; revaluing a farm for redemption at four or five times its original appraisal in the same proceeding; setting or adjourning meetings at the convenience of creditors and refusing the same to the farmer debtor, issuing illegal orders and ordering liquidation for noncompliance; holding that this court may not "take away" the "right" of dismissal; dismissing a proceeding without hearing upon the recommendation of a conciliation commissioner without notice of either; issuing a stay order and contemporaneously ordering redemption within a few months; recommending dismissal of a proceeding because a proposal does not provide for payment of secured debts in full; assessing costs above the $10 maximum provided; refusing to rent all the farm property to him; authorizing sale in foreclosure without his knowledge or notice; appointing a trustee to serve throughout the proceeding; taking from him the possession of his property under section 75 (a) to (r); seizing and appropriating all farm proceeds; notifying produce purchasers that the estate is in bankruptcy; refusing to ask or to renounce reappraisal so he may know the valuation for redemption; interfering with his tenants and employees; refusal to pay for upkeep of the farm property out of rent; permitting creditors to say whether upkeep or taxes shall be paid; saying "whatever is all right with the creditors is all right with me"; ordering an estate sold because a conciliation commissioner has failed to transmit a certificate on a petition for review; permitting numerous successive applications for dismissal to be heard. These are but samples of what farmer debtors have to meet in a hostile or at best, unsympathetic, atmosphere.

In altogether too many instances the record shows, upon its face, that the proceeding has followed the due course of the law whereas in fact it was not so conducted.

VIII.

The Experience of the World Applied to Mr. Pfister's Case.

The only thing decided by the District Court was that it was "without jurisdiction". R. 175, top of page. R. 177, middle of page. The appellate court sustained the district court saying "The District Court followed the statute and it had no power to do otherwise." R. 214, bottom of page. This court disagreed with the appellate court holding that the District Court had power to review. The District Court and the Appellate Court are reversed upon the only issue in the case.

The Appellate Court excursioned far beyond the issue in several directions and returned with the conclusion that if the district court had had jurisdiction, it would have sustained the conciliation commissoner's two orders whch were the subjects of the petitions for review. R. 209, 215.. The opinion of this court also went beyond what was "essential to the opinion" and held that if the district court had exercised its jurisdiction and reviewed the orders, it would have sustained them. This conclusion is vital to the petitioner's rights and will be examined.

It is unfortunate that the excursive discussions of the appellate court included more subjects than could be adequately presented and considered in this court. It is significant that in its excursions the Appellate Court, and likewise this court in its opinion, did not mention the heart and

substance of the disputed issues that **would have been** adequately presented to the district court but **could not be** there presented because **the District Court held it had no jurisdiction.**

The District Court is a court of primary and general jurisdiction over the entire proceeding within the limits of the statute. Its conciliation commissioner is but an arm of the court. **It could reexamine into the whole case from start to finish.** A bankruptcy case is one suit from beginning to end and the bankruptcy court is always open to consider or reconsider any subject of the suit. *Sandusky v. National Bank*, 1875, 90 U. S. (23 Wall.) 289, 292. It could hear evidence fully; the Appellate Court could not. The Appellate Court went far beyond its jurisdiction when it excursioned into the field of what **might have been** and the result in the District Court if it had had jurisdiction. The result reached by the Appellate Court is erroneous because if the District Court has jurisdiction, as this court says it has, what the Appellate Court surmised would have been, would **not have been.** The Appellate Court had no right to predetermine the District Court's conclusion, especially so because this court has held that the Appellate Court's legal conclusion was false. This court is subject to the same limitation. It can not now decide what the record would be after the District Court should comply with this court's final determination that it has full power to consider the petitions for review.

The significant facts upon which petitions for review were designed to operate and which have not been mentioned by either reviewing court are:

1. The entire estate consists of an 80 acre, 18 cow, dairy farm. R. 70 to 72.

2. The total appraised value of the real estate was $16,000; of the personal property including exemptions $2471. The cows were appraised at $65 each. R. 70 to 72. From this appraisal it is seen that those eighteen cows valued at $1170 for the whole of them, were the sole income producing property. It is common knowledge that a dairy cow produces milk only following the birth of a calf; that nine months is the period of gestation; and that a cow must have a rest period averaging two months per year or one-sixth of the time. That is, there would be about fifteen producing cows at a time. It is also common knowledge that the flow of milk is greatest at freshening and decreases until she is dried up preceding the beginning of the next lactation period.

3. The conciliation commissioner's orders required:

(1) rent at $6375 to be paid within two years, eight months and thirteen days. R. 72 to 77.

(2) additional payments of $6375 to be paid within the same period. R. 72 to 77.

This was a total of $12,750, or more than **thirteen times** the value of the producing cows, to be produced in two years, eight months and thirteen days, or a "net income" dividend, based upon the value of the eighteen cows, of 402 per cent per year! Each cow would have to produce a "net income" dividend of over 480 per cent per year!

Section 75(s)(2) makes the rent to be based upon the "**rental value, net income and earning capacity.**" The whole of this rent is payable to the court. All expenses and the farm family's living must come from the gross income before the "net income" is paid to the court. (No distinction may be made as to the "additional payments" because they must come from exactly the same source, the "net income".)

3. A few days later the conciliation commissioner ordered the cattle, horses, hogs, farm machinery, and crops be sold as "perishable property," "not reasonably necessary for the farming operation" and "not inconsistent with . . . the debtor's ability to pay with a view to his financial rehabilitation." Section 75(s)(2).

The mere recital of these facts: (1) an 80 acre, 18 cow dairy farm; (2) payments of $12,750 in two years, eight months and thirteen days, from net income and earning capacity, to any farmer invariably elicits more than vehement expostulation.

When there is added (3) the order to sell livestock, implements and crops as "perishable" the elicitation exceeds all description.

It is most respectfully, but most earnestly urged that there never was an instance where "Equal Justice Under Law" more pressingly than in this case required that "the courts must henceforth, far more than in the past, look for light beyond the law books to the experience of the world in which we live." Quoted from the statement of the Chief Justice at the Memorial Tribute to Justice Brandeis.

Both the conciliation commissioner and the appellate court "looked for light beyond the law books" but they looked in dark and most peculiar places. For instance they said:

> "**In passing**, it must be said of the debtor that he is an unusually intelligent man, having at one time been President of the Pure Milk Association of the Chicago area." Conciliation Commissioner's opinion, R. 115.

Which, being paraphrased, is again "And, sure he is an honorable man. Look, in this place ran Cassius' dagger through."

> "The debtor was an ignorant man, for at one time he had been president of the Pure Milk Association of the Chicago Area." Appellate Opinion, R. 215.

Ergo, (let us be consistent), the President of the Chicago Bar Association, being, also therefore, "a very intelligent man," must know how to milk a cow! And how to run a dairy! There is no more logic in holding a lawyer to dairy knowledge than there is of expecting a dairy farmer to know how to conduct his farmer debtor proceeding.

But says the conciliation commissioner again:

> "Any court must necessarily require the business of its office to be conducted through attorneys, so that an orderly procedure may be followed." R. 163.

It is apparent that the conciliation commissioner did not take to heart Section 75(q): "farmers shall not be required to be represented by any attorney in any proceeding under this section." Nor the provision of the same subsection (q) that upon request the conciliation commissioner shall assist the farmer in **all matters** arising under Section 75.

The two opinions of the conciliation commissioner and that of the Appellate Court abound with gems of equal lustre. e.g. The conciliation commissioner says he set a "rental and fixed the principal payments at amounts which were **substantially less than the maximum amount suggested by the debtor's own counsel.**" R. 162. That is, the farmer debtor's counsel suggested a total of rent and principal payments even **higher than the $12,750 ordered to be paid in two years, eight months and thirteen days!** Thus the conciliation commissioner "assisted the farmer."

Again the conciliation commissioner says anent Attorney Dazey who was suffering from apoplexy with a blood pressure as high as 232 that "If he did not feel able to carry on his work, he had an abundance of time to engage other counsel". R. 115.

These examples of many other instances in the record show the hostile atmosphere in which this farmer debtor proceeding was immersed. This atmosphere was epitomised by the slogan: "What is all right with the creditors is all right with me"—a guide more applicable to a regular bankruptcy proceeding, but anathema to a farmer debtor proceeding.

This proceeding was by statute intrusted to a court of equity. A court of equity should look at the substance, not at the form. A court of equity does justice, it does not catch on technicalities.

In the opinion there occur the following inaccuracies of factual statements:

1. Page 2 of the printed opinion: "On September 7, 1940, orders were entered for the sale of certain property, chiefly livestock, **stipulated by the debtor to be perishable under Section 75(s)(2).**"

2. Page 6 of the printed opinion: Referring to the "orders of September 7." "They were orders for sales of perishable property, Section 75(s)(2), **stipulated to be perishable** by counsel for the debtor."

There was no such stipulation. None is set out in the record. There is a reference to a "stipulation" in the entry of August 13 at R. 9.

The entry of September 7, 1940, shows the orders resulted from petitions therefor. R. 10. These petitions did not allege any "stipulation". R. 42 to 65.

The order on Hartman's petition alleges that the farmer debtor through his attorney, Coulson, "having stipulated" that the cows were perishable under Section 75(s)(2). R. 78, paragraph 2. The order on the Bank's petition does not refer to any claimed "stipulation" or to "perishable." R. 80 to 82. The order on the Northern Illinois' petition alleges that the farmer debtor through his Attorney Coulson "has stipulated" that the dairy cattle are perishable under Section 75(s)(2). R. 82 to 88.

At his first opportunity the farmer debtor in his petition for Emergency Restraining Order, stated that no stipulation, consent or admission was ever made that the cows or any other property was perishable within Section 75(s)(2). R. 32, paragraph 10. This statement was verified by Attorney Coulson and by the farmer debtor. R. 33, bottom of page. R. 34, top of page. He repeated this statement in his petition for rehearing to the conciliation commissioner which he verified and the affidavit of Attorney Coulson was a part of it. R. 93, paragraph 7. R. 94 and 95.

Attorney Coulson made a separate affidavit that he did not stipulate or agree that any of the cows were perishable. He said he was asked whether the cows were perishable and "he answered that if they meant to ask him whether the cows would die, he would answer yes." R. 94 and 95.

Although present counsel for the farmer debtor did not participate in the proceeding until after the alleged orders of September 7, 1940, were supposed to have been entered (on the same date), he is personally convinced that

they were not so entered. His considered reasons for his conclusion are stated on pages 18 to 23 of the "Reply Brief for Petitioner" filed in this court in October 1942. They are there traced through the record. These record facts can not be gainsaid. The record nowhere shows service of this, (or these) orders, of September 7 on the farmer debtor or on his counsel. The record presents very slender evidence indeed which would support the emasculation of the very heart of the statute—that is **possession in the farmer debtor in order to accomplish his rehabilitation.**

It may be asked: By what legal doctrine does a statement in an order, approved by his opponent but not approved by him and never submitted to him, become evidence against him?

IX.

Some Portions of the Opinion Examined.

1.

Anent Note 7 at page 4 of the Pfister opinion which cites the foregoing Seminole decision (*U. S.* v. *Seminole*, 299 U. S. 417), as authority for the following statement:

> "Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins to run from the date of the denial of the petition for rehearing."

It is pertinent to call attention to the fact that the contemporaneous[1] opinion in this case of *Wayne* v. *Owens-Illinois*, 1937, 300 U. S. 131, 137, says:

[1] The Seminole case was argued December 10, 1936, decided January 4, 1937. The Wayne case was argued January 7, 1937, decided February 13, 1937.

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. **There is no controlling reason** for denying a similar power to a court of bankruptcy or **for limiting its exercise to the period allowed for appeal.**"

2.

Pfister opinion, page 4, bottom of page:

"When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry." Citing *Bowman* v. *Lopereno*, 311 U. S. 262, 266, and *Wayne* v. *Owens*, 300 U. S. 131, 137, 138.

This statement just quoted is true but **it is not a statement of the whole truth.** It comes **within** the rule but **it does not prescribe the limitation of the rule.** It is quite true that "when the issues of the original order are reexamined" the finality of that order is suspended. But it is not necessary to go that far.

It is not necessary for the operation of the rule that there shall be a rehearing of the evidence which preceded the order, and which supplied the judicial material upon which the order was constructed, or that new evidence shall be submitted. It is sufficient if the court shall consider whether it is going to entertain the motion for rehearing. An examination of the cases cited to support the above quoted statement shows that the quoted statement does not contain the limitations of the rule.

We proceed to examine the two cases cited at page 4 of the opinion in the quotation set out above:

Bowman v. *Lopereno*, 311 U. S. 262, 266. The sole question was whether an appeal was taken in time. The answer depended upon whether a motion for rehearing, entertained by the District Court, suspended the time for appeal.

Before quoting the language of the Bowman opinion at page 266, it is necessary first to quote the facts on which it is founded. These facts appear at pages 264 and 265.

> Page 264: "November 15, 1937, the debtor filed a petition for rehearing . . . **On the same day** the judge of the District Court endorsed on the petition: 'This petition having been "seasonably presented" and "entertained" by the above entitled court, **permission to file same** is hereby granted.'".
>
> Page 265: February 17, 1938. "The petition for review [rehearing] is denied."

Note that there was **no examination of the issues of the original order.** All the endorsement did was to grant **permission to file** the petition for rehearing.

The Pfister situation comes within this same circle for the conciliation commissioner, although no formal "permission to file" was entered, denied motions to dismiss on the ground that the applications for rehearing were filed out of time and therefore there existed no jurisdiction to hear them. (One of the motions to dismiss and the denial appear in the record. R. 148, 149. The other motion was orally made and denied.) This corresponds with the formal "permission to file" in the *Bowman* v. *Lopereno* case. Furthermore this court has expressly held that when such a motion for rehearing is filed, argued and

considered, a formal leave to file it is not necessary. *Aspen* v. *Billings*, 1893, 150 U. S. 31. *Kingman* v. *Western*, 1893, 170 U. S. 675.

Here is what this court said about the above facts in *Bowman* v. *Lopereno*, at page 266 of *Bowman* v. *Lopereno*:

> **"Treating . . . the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits"** . . .
>
> "These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained **or** considered on its merits, or a motion for **leave to file** such a petition out of time, if not acted on or if denied by the trial court, can not operate to extend the time for appeal. But where the court **allows the filing** and, after considering the merits, **denies** the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

Three citations are given in Note 4 of the opinion at page 266 of *Bowman* v. *Lopereno* to support the above quotations. They are:

(1) *Voorhees* v. *Noye*, 1894, 151 U. S. 135, 137. A motion for rehearing was filed and ten months later it was argued and taken under consideration. After two months (twelve months in all) it was reargued. The court then denied the motion, holding "it is now too late to sustain said motion or to interfere with the decree." There was no examination of the issues of the original order. The court said it was "too late." This court held that the denial dated the time for appeal "because the application for rehearing was **entertained** by the court" citing *Aspen* v. *Billings*, 150 U. S. 31, which in turn cited

Brockett v. *Brockett*, 43 U. S. (2 How.) 238; *Texas* v. *Murphy*, 111 U. S. 488, and *Memphis* v. *Brown*, 94 U. S. (4 Otto) 715, in none of which was the original judgment examined. In each instance the application for rehearing was merely denied.

(2) *Gypsy* v. *Escoe*, 1939, 275 U. S. 498. This court suggested that if a second petition for rehearing "is actually **entertained**" by the state supreme court, the time for seeking certiorari would run from the denial of such petition for rehearing.

(3) *Wayne* v. *Owens*, 311 U. S. 137, 138. "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

The *Wayne* v. *Owens* opinion cites four decisions to support the above quotation. They are *Aspen* v. *Billings*, *Voorhees* v. *Noye*, *Citizens* v. *Opperman*, and *Morse* v. *U. S.* (These four cases are discussed at pages 11, 12, 22, and 24 of this petition for rehearing). In none of them was the original judgment examined. In each the motion for rehearing was merely denied.

3.

Pfister opinion, page 5, middle of page:

"On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for

> a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended."

There are three citations cited to support the above quotation. They are *Bernards* v. *Johnson*, 314 U. S. 19, 31; *Bowman* v. *Lopereno*, 311 U. S. 262, and *Chapman* v. *Federal*, CCA 6, 117 Fed. (2d) 321, 324.

(1) *Bernards* v. *Johnson*, 314 U. S. 19, 31. The record, says the opinion, is "long and complicated." To specify the dates of filings (sixty-two in all through a period of six years) with a mere designation of each would consume two pages or more. A large number of these were orders which were never appealed. No motion for rehearing was ever filed. This court in enumerating the issues brought before it said, at page 30: "The District Court disposed of three distinct matters in the orders under review" . . . the first of which is the only one pertinent here, namely: "The petition for review of the commissioner's orders of January 11, 1937." That conciliation commissioner's order of January 11, 1937, was an order dismissing a petition filed with him on January 4, 1937, which was **not a petition for rehearing**. He dismissed it on the ground that all requests in it had once before been adjudicated and become final. There was no hearing. Nothing was considered. The conciliation commissioner refused to entertain the petition. Upon review the District Court sustained the conciliation commissioner's dismissal. This court at page 30 of the opinion said: "The court [i.e. the District Court] clearly affirmed the Commissioner's

refusal to consider the petition for the reason stated by him."

Bernards v. *Johnson* does not impinge upon the rule that a petition for rehearing, entertained, or considered, by a court suspends the finality of the order to which it is directed until it is acted upon. The factual situation is not akin to that in the Pfister proceeding where (1) petitions for rehearing were filed. R. 88 to 97. R. 139 to 147. (2) Answers to them were filed. R. 97 to 105. R. 151 to 157. (3) Motions to dismiss them for lack of jurisdiction were filed and denied. R. 148, R. 149. (A companion order to dismiss on the same ground and its denial were verbal and do not appear in the record. Their occurrence has never been denied.) (4) The conciliation commissioner "*considered*" the "*entire proceeding.*" R. 13, entry of November 28, 1940. R. 109 to 116. R. 158 to 164. No application for rehearing in all the cases on the subject of rehearing was so fully and completely considered and entertained as these Pfister petitions for rehearing.

(2) *Bowman* v. *Loperena*, 311 U. S. 262, "and cases cited." This opinion has been fully discussed at page 48 of this petition for rehearing. The "cases cited" in that opinion have there and elsewhere also been fully discussed in this brief. They are *Morse* v. *U. S.*, *Wayne* v. *Owens*, *Voorhees* v. *Noye*, and *Gypsy* v. *Escoe*. (See pages 24, 27, 25 and 12 of this petition for rehearing.) The consideration of the petitions for rehearing in the *Pfister* case was far more extensive than that given to similar applications in any of the cited cases.

(3) *Chapman* v. *Federal*, CCA 6, 117 Fed. (2d) 321, 324. No time will be wasted on this opinion. It is loose and illogical. No court has ever questioned the rule that the denial of an application for rehearing is a discre-

tionary order and not subject to appeal. Every decision of this court there cited fails to support that opinion except the *Conboy* case which has never been followed and which assumed to follow decisions of this court which were *contra*. There were two appeals in the *Chapman* case involving the same real estate. One was the farmer debtor petition of the father as administrator and personal representative of the deceased owner. The other was a companion petition filed by the father and sons as heirs of the deceased owner. The appellate court sustained the personal representative's proceeding and the other was moot and aborted by the portion of the opinion applicable to it. The right to have the estate and its debts administered in a farmer debtor proceeding was fully sustained.

4.

The opinion in this *Pfister* case says, at the beginning of the last paragraph on page 5 of the printed opinion:

> "If **a consideration of the reasons** for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the **mere filing** of an out of time petition would be enough."

It is the entertaining, that is the consideration—not the mere filing—of an application for rehearing which operates the rule. Every decision that this court has made upon the subject has required that **in addition to filing** an application for rehearing **it must be entertained**, that is considered, by the court. The burden is upon the movant to bring the motion to the attention of the court and thus to ascertain whether the court **entertains** it. It is the entertaining that invokes the power of the court. Whether or not the court will **entertain** the application and thus invoke its power is within the court's discretion. If the court re-

fuse to **entertain** the application, the applicant knows the appeal dates from the original order. There is thus no possibility for entrapment, either by the movant or by the nature of the court's ultimate action.

Any other method of operating the rule would make a game of legal procedure, and set a trap. The game would be to wait to see what **form** the final **exercise** of the court's **power** might take at the very end of a series of pleadings, hearings, findings of law and fact, and the order thereon.

Under the game theory:

(1) If the final pronouncement took the form "Motion for rehearing granted. Original order adhered to," or "Motion for rehearing granted. Original order adhered to," or "Motion for rehearing granted. Original order set aside. Original order reinstated," the rule would operate and the time for appeal would then start to run.

(2) But if it took the form: "Motion for rehearing denied," the rule would not operate. But this result would not be known until then. The time for appeal would run from the original entry of the judgment and the right of appeal ordinarily would be lost.

There is no difference whatever in the substantive result between Form 1 and Form 2. Each leaves the original order intact. But the procedural result of Form 1 is the antithesis of the result of Form 2. By the rules of the game Form 1 would permit an appeal while Form 2 would not.

This court has considered and rejected this game theory. It characterized it as an "impossible assumption that the finality of that judgment existed before the happening

of the cause by which alone finality could be attributed to it." *Andrews* v. *Virginian*, 1911, 248 U. S. 272, at page 275. That is, under the game theory no assurance of finality could be attributed to a judgment until after the court indicated the form of its disposition of a motion for rehearing. The case just cited involved a petition to an upper state court to review the judgment of a lower state court which it denied. Subsequent opinions of this court have cited it and applied its reasoning to applications for rehearing. *Chicago* v. *Basham*, *Citizens* v. *Opperman*, *Morse* v. *U. S.* These four cases are discussed at pages 20, 22, 23 and 24 in this petition for rehearing.

CONCLUSION.

1. It seems clear that the petitioner, having had the only issue in his case decided in his favor, that is that the District Court has jurisdiction to hear his petitions for review, should have the right to have his case submitted to that court under its jurisdiction. This is especially true because only that court has unrestricted power to examine his whole case and do the justice that the situation developed will require.

2. It seems equally clear that the two petitions for rehearing made to the conciliation commissioner of the District Court invoked the rule, adhered to and developed by this court through a period of nearly a century, that the denial of a petition for rehearing of an order which petition for rehearing has been entertained by the court, suspends or tolls the time for appeal so that it runs from such denial.

3. It necessarily follows, if the foregoing statements are correct, that this case should be reheard.

Wherefore the petitioner prays that his petition for rehearing be granted.

ELMER MCCLAIN, Lima Ohio,
Counsel for the Petitioner.

Lima, Ohio
January 4, 1943.

Certificate of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ELMER MCCLAIN.

SUPREME COURT OF THE UNITED STATES.

Nos. 26 and 27.—October Term, 1942.

Henry Anton Pfister, Petitioner,
26 *vs.*
Northern Illinois Finance Corporation, Algonquin State Bank, Hartman and Son, et al.

Henry Anton Pfister, Petitioner,
27 *vs.*
Northern Illinois Finance Corporation, Algonquin State Bank, Hartman and Son, et al.

On Writs of Certiorari to the United States Circuit of Appeals for the Seventh Circuit.

[November 16, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari, 315 U. S. 795, brings here certain rulings on the right of petitioner, a farmer-debtor, to have reviewed the orders of a conciliation commissioner[1] under Section 75 of the Bankruptcy Act. This section deals with Agricultural Compositions and Extensions. A conflict of circuits as to whether the ten day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal,[2] impelled us to grant our writ. *In re Pfister*, 123 F. 2d 543, 548; *Thummess* v. *Von Hoffman*, 109 F. 2d 291, and *In re Albert*, 122 F. 2d 393.

In addition to this point numerous other questions as to the right to review are presented which may be fairly subsumed under petitioner's allegations of error below (1) because the courts did

[1] The referee appointed by the District Court for handling agricultural compositions is known as a conciliation commissioner. § 75(a)-(r). When the farmer seeks bankruptcy under (s) the conciliation commissioner acts as referee. § 75(s)(4). 49 Stat. 942.

[2] 52 Stat. 840, 858.
Section 39(c). "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. . . ."

not apply the limitation in the proviso of 75(s)[3] instead of that in 39(c); (2) because petitions for rehearing of a conciliation commissioner's orders, which petitions were entertained and denied, were not held to extend the period for review and (3) because the order of stay approved by the Commissioner under 75(s)(2) was for less than the statutory period of three years from the entry of the stay order.

After failing to obtain a composition or extension under Section 75(a) to (r) of the Bankruptcy Act, the petitioner, a farmer, sought relief under Section 75(s). In due course on August 10, 1940, he petitioned the Commissioner to fix his rent, permit him to retain his property and establish a stay or moratorium. In the petition he stated that his moratorium began to run on April 26, 1940. On August 13, 1940, the Commissioner, after hearing evidence upon its amount, ordered that the rental be fixed at a sum named, and directed a stay from April 26, 1940, as the petitioner suggested. An appraisal was approved by a separate order on the same day, August 13. On September 7, 1940, orders were entered for the sale of certain property, chiefly livestock, stipulated by the debtor to be perishable under Section 75(s)(2). After the ten days fixed for review under 39(c), petitions for rehearing on the orders fixing rental, granting stay and directing sale, were filed with the Commissioner. The basis of these petitions and the

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[3] 49 Stat. 942, 943.

Section 75(s). "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

Six other subdivisions of subsection (s) follow, numbered (1) to (6), inclusive, and relate chiefly to proceedings after appraisal.

reasons for their denial by the Commissioner are detailed in division II of this opinion.

Petitions for review were filed which were timely if petitioner was right in his contention that the Commissioner's action on the petitions for rehearing extended the time for appeal for ten days from the entry of the Commissioner's order denying rehearing. The two numbers, 26 and 27, of our docket, refer to these two petitions for review consolidated for hearing. The District Court denied each of the petitions for review on the ground that there was no jurisdiction in it to review, since the petitions for review were filed after the ten days provided by 39(c) and the rules of the District Court and since the denial of the petitions for rehearing did not extend the time. The Court of Appeals affirmed the judgment on the grounds that 39(c) governed, that the time for review was not extended by the petitions for rehearing, that there was no basis for reversing the Commissioner's action on the petitions for review and that the "petitions for review were not filed in time." We disagree with the Court of Appeals upon the last ground on the assumption that the language meant that the District Court was without "power" to review the orders. We agree with the Court of Appeals upon the first three grounds and therefore affirm the judgment.

I. The proviso of subsection 75(s), note 3 *supra*, is, we think, limited in its effect to steps before commissioners authorized by the provisions of Section 75(s) which precede the proviso. Congress evidently intended to allow adequate time for reflection and preparation before appeal by parties aggrieved by the basic and difficult finding of value. The provisions of Section 75(s) following the proviso authorize orders setting aside exemptions, leaving the appraised property in the hands of the debtor and fixing rentals therefor, staying judicial proceedings, selling perishable property, directing reappraisals and final sale of the estate. It is obvious that this proviso, couched in terms of appeal, could not have been intended to control the review of the manifold activities of a commissioner engaged in handling an estate through three or more years of bankruptcy. To hold the proviso generally applicable would leave unregulated reviews of orders entered more than four months after the commissioner approves the appraisal. The section applicable to these reviews is Section 39(c).[4]

[4] The legislative history of the proviso indicates the soundness of this conclusion. It appears first in the earlier subsection (s), 48 Stat. 1289, which

II. The petitions for review of the Commissioner's orders of August 13, 1940, and September 7, 1940, which were filed November 28, 1940, and October 9, 1940, no extension having been granted, were out of time under Section 39(c)[5] unless, in accordance with the petitioner's contentions, the time for review was to run from the entry of the orders of the Commissioner denying the petitions for rehearing of the order of August 13, which petition was filed September 16, 1940, and of the orders of September 7, which petition was filed September 20, 1940. These orders of the Commissioner denying the petitions for rehearing were entered November 28, 1940, and September 30, 1940.

Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on,[6] that is, they may be granted "before rights have vested on the faith of the action," and the foundations of the original order may be reexamined. *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137.[7] When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry. *Bowman* v. *Loperena*, 311 U. S. 262, 266;

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was held unconstitutional in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555. The preceding provisions were substantially the same as the present ones but the proviso read "That in case of real estate either party may file objections, exceptions, and appeals within one year from date of order approving appraisal." The specification of real estate, of course, excluded the proviso from any generality of scope. When the section was amended after the Radford case, the committee reports treated the paragraph of (s) as quoted in note 3 separately from the succeeding numbered paragraphs and the language connotes the idea that the proviso relates only to appeals from the appraisal. The comment is as follows: "It provides that the referee, under the jurisdiction of the court, shall designate and appoint appraisers, to appraise all of the property of the debtor, at its then fair and reasonable market value. The appraisal is made in all other respects, with rights of objections, exceptions, and appeals, in accordance with the Bankruptcy Act; and either party may file objections, exceptions, or take such appeals within 4 months. Surely there is no question of constitutionality up to this point." S. Rep. No. 985, 74th Cong., 1st Sess., p. 3; H. Rep. No. 1808, 74th Cong., 1st Sess., pp. 3-4.

[5] See note 2, *supra*.

[6] See the discussion in division III of this opinion.

[7] Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time and limitation upon proceedings for review begins from the date of denial of the petition for rehearing. Morse v. United States, 270 U. S. 151, 153-4; United States v. Seminole Nation, 299 U. S. 417, 421; Gypsy Oil Co. v. Escoe, 275 U. S. 498.

Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131, 137-8. The reason for taking the later date for beginning the running of the time for review is that the opening of the earlier order by the court puts the basis of that earlier order again in issue. A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. An appeal does not lie from the denial of a petition for rehearing. *Conboy* v. *First Nat. Bk. of Jersey City*, 203 U. S. 141, 145; *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Brockett* v. *Brockett*, 2 How. 238; *Roemer* v. *Bernheim*, 132 U. S. 103; *Jones* v. *Thompson*, 128 F. 2d 888; *Missouri* v. *Todd*, 122 F. 2d 804.

On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.[8]

If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough. Of course, the court must examine the petition to see whether it should be granted. Indeed the examination given a motion to file such a petition might just as well be said to justify the advancement of the time for review. It is quite true that in a petition for review upon the ground of error in law in the original order, the examination of the grounds of the petition for rehearing is equivalent to a reexamination of the basis of the original decree. But in such a case the order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the original order. Cf. *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137-38. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

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[8] Bernards v. Johnson, 314 U. S. 19, 31; Bowman v. Loperena, 311 U. S. 262, and cases cited; Chapman v. Federal Land Bank, 117 F. 2d 321, 324.

In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the reexamination of the original orders. The petition for rehearing of the order of August 13, relating to rent, sought to produce evidence that the rental fixed was too high, raised a question of law that a full three years stay was not allowed and alleged a lack of representation by counsel. A motion to dismiss the petition for rehearing as out of time was denied. The Commissioner examined the petition for rehearing and determined that the debtor had had full opportunity to present his evidence at the hearing and that the stay was in accordance with the debtor's motion and that counsel for the debtor appeared at each hearing and knew of each order. He therefore concluded "that there is no equity or merit in the petition for rehearing" and denied the petition. The petition for rehearing of the orders of September 7 was similarly handled. They were orders for sales of perishable property, § 75(s)(2), stipulated to be perishable by counsel for the debtor. Rehearing was sought because of lack of representation by counsel and lack of notice of the orders. The Commissioner's decision on the petition for rehearing sets out the record facts showing representation and notice. We therefore conclude that the Commissioner did not reexamine the basis of any of the original orders and that time for filing the petitions for review was not extended.

III. Since the petitions for rehearing, in our opinion, did not extend the time for review, we are brought to examine the question as to whether Section 39(c), *supra* note 2, is a limitation on the power of the District Court to act or on the right of a party to seek review. Courts of bankruptcy are courts of equity without terms. Commissioners, like referees, masters and receivers, supervise estates under the eyes of the court with their orders subject to its review. The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights. Cf. *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137; *Bowman* v. *Loperena*, 311 U. S. 262, 266.

Prior to the adoption of 39(c), General Order in Bankruptcy No. XXVII,[9] now abrogated,[10] governed review of referee's orders

[9] 172 U. S. 662.

[10] Abrogated January 16, 1939, effective February 13, 1939. 305 U. S. 681.

but it prescribed no time limitations. It was held that petitions should be filed within a reasonable time.[11] Some local court rules therefore specified time limitations. Where such rules imposed definite limits on the time within which a petition for review could be filed, with extensions to be granted on cause shown, out of time petitions nevertheless were entertained and considered if cause was shown.[12]

Section 39(c) was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity but the legislative history reveals no intention to change the preexisting rule as to power.[13] Indeed, the Chandler Act by the amendment to section 2(10)[14] sought to conform the act to the prevailing practice as to the bankruptcy court's exercise of its appellate jurisdiction over referee's orders.[15] We do not think section 39(c) was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. The power in the bankruptcy court to review orders of the referee is unqualifiedly given in Section 2(10). The language quoted from section 39(c) is rather a limitation on the "person aggrieved" to file such a petition as a matter of right.[16]

The review out of time of the Commissioner's orders is then a matter for the discretion of the District Court. As that Court

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[11] American Trust Co. v. W. S. Doig, Inc., 23 F. 2d 398; Crim v. Woodford, 136 F. 34; Bacon v. Roberts, 146 F. 729; In re Grant, 143 F. 661; In re Foss, 147 F. 790. 8 Remington on Bankruptcy (5th Ed. 1942) § 3704.

[12] In re Oakland and Belgrade Silver Fox Ranch Co., 26 F. 2d 748; In re T. M. Lesher & Son, 176 F. 650; Amick v. Hotz, 101 F. 2d 311; In re Wister, 232 F. 898, affirmed 237 F. 793; see Roberts Auto & Radio Supply Co. v. Dattle, 44 F. 2d 159.

[13] H. Rep. No. 1409, 75th Cong., 1st Sess., p. 11; Committee Print, H. R. 12889, 74th Cong., 2d Sess., 149-50.

[14] Section 2(10) gives the bankruptcy court jurisdiction to "consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings." 52 Stat. 842. Whereas the subsection formerly read "consider and confirm, modify or overrule or return with instructions for further proceedings records and findings certified to them by referees." 30 Stat. 545.

[15] H. Rep. No. 1409, *supra*, p. 19; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 11, compare Committee Print, H. R. 12889, *supra*, p. 11.

[16] Thummess v. Von Hoffman, 109 F. 2d 291; In re Albert, 122 F. 2d 393; Boyum v. Johnson, 127 F. 2d 491, 497, see Biggs v. May, 125 F. 2d 693, 696; In re Loring, 30 F. Supp. 758, 759. Contra, In re Pfister, 123 F. 2d 543, 548; In re Parent, 30 F. Supp. 943. Compare 2 Collier on Bankruptcy (14th ed. 1940 §§ 39.16, 39.20; 8 Remington on Bankruptcy, *supra*, § 3765.

was of the opinion it was "without jurisdiction" by virtue of section 39(c), its discretion was not exercised. However, as we are of the view that the petitions for rehearing were not supported by adequate facts justifying a reexamination of the bases for the orders of August 13 and September 7, 1940, and no others are alleged, and that therefore the District Court should not have entered into an out of time review of these original orders, there is no reason for a reversal of the judgments. The Commissioner upheld the petitions for rehearing against a motion to dismiss because they were out of time. He thereupon heard and passed upon the petition's merits as bases for rehearings. His reasons for refusing to open the original orders complained of are adequate and amply supported by the record. The appraisal was made and the time of stay fixed pursuant to the debtor's motion, he was represented by one or more counsel at each meeting, had opportunity to present evidence and stipulated to the perishable character of the property ordered sold. See the last paragraph of division II.

IV. On account of debtor's motion, requesting the running of the moratorium of three years from April 26, 1940, the day of his adjudication in bankruptcy under 75(s), we do not consider the correctness of a stay of less than three years under other circumstances. In this instance it was correct.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.